

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

CYNTHIA REEVES

Claimant

VS.

HALLMARK CARDS

Respondent

Self-Insured

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Docket No. 256,002

ORDER

Claimant appeals the July 24, 2002 Award of Administrative Law Judge Brad E. Avery. Claimant was awarded benefits for a functional impairment only, after the Administrative Law Judge found claimant's work disability was offset by the total of claimant's retirement funds withdrawn at the time claimant terminated her employment with respondent pursuant to K.S.A. 1999 Supp. 44-501(h). Claimant objects, arguing a substantial portion of the funds withdrawn did not constitute retirement funds, but instead constitutes a profit sharing plan. The Appeals Board (Board) held oral argument on February 4, 2003.

APPEARANCES

Claimant appeared by her attorney, Roy T. Artman of Lawrence, Kansas. Respondent and its insurance carrier appeared by their attorney, Gregory D. Worth of Roeland Park, Kansas.

RECORD AND STIPULATIONS

The Board has considered the record and adopts the stipulations contained in the Award of the Administrative Law Judge. In addition, at oral argument, the parties stipulated that the payments made to claimant from the cash balance retirement fund in the amount of \$20,543.47 constitute a retirement benefit under K.S.A. 1999 Supp. 44-501(h) and an offset of that amount is appropriate.

ISSUES

- (1) Claimant appealed the issue addressing the nature and extent of claimant's injury and disability. However, the Administrative Law Judge made no findings or conclusions with regard to any work disability to which claimant may be entitled under K.S.A. 1999 Supp. 44-510e. If the ruling of the Administrative Law Judge regarding claimant's profit sharing plan pursuant to K.S.A. 1999 Supp. 44-501(h) is reversed, both parties request this case be remanded to the Administrative Law Judge for a determination of the undecided issues.
- (2) Did the Administrative Law Judge err in limiting claimant's award to a functional impairment after applying K.S.A. 1999 Supp. 44-501(h)?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the Administrative Law Judge identifying claimant's profit sharing withdrawals as retirement funds pursuant to K.S.A. 1999 Supp. 44-501(h) should be reversed.

At the time of the regular hearing, claimant was a 49-year-old high school graduate who began working for respondent in 1979. Claimant worked at several jobs, including cook, auto reeler, ribbon spooler, off-bearer in the flock department and quality control inspector. Claimant began developing problems in her upper extremities while working a job called page insert press. This job involved loading 400 cards per minute and was a repetitious, upper-extremity-intensive job. Claimant's problems ultimately developed into bilateral carpal tunnel syndrome. Claimant was also diagnosed with spondylosis of the cervical spine for which she received conservative treatment.

Due to the pain, claimant terminated her employment with respondent on May 24, 2000. Shortly before and at the time of claimant's termination, she withdrew funds from three separate accounts that had accrued over her term of employment with respondent. The total withdrawals from those funds exceeded \$137,000.

K.S.A. 1999 Supp. 44-501(h) states:

(h) If the employee is receiving retirement benefits under the federal social security act or retirement benefits from any other retirement system, program or

plan which is provided by the employer against which the claim is being made, any compensation benefit payments which the employee is eligible to receive under the workers compensation act for such claim shall be reduced by the weekly equivalent amount of the total amount of all such retirement benefits, less any portion of any such retirement benefit, other than retirement benefits under the federal social security act, that is attributable to payments or contributions made by the employee, but in no event shall the workers compensation benefit be less than the workers compensation benefit payable for the employee's percentage of functional impairment.

Claimant withdrew funds from both a thrift account and a profit sharing account. The thrift account funds in the amount of \$285.87 were withdrawn on January 9, 2001. Respondent's Exhibit B to the regular hearing (the April 9, 2002 letter from Mary Hofmeister, the senior benefit specialist) defines the thrift and supplemental thrift plans as being voluntary employee contribution plans. There is no indication in that document that any monies paid into these accounts originated from respondent. K.S.A. 1999 Supp. 44-501(h) does not include any portion of any such retirement benefits that are attributable to payments or contributions made by the employee. As this record indicates the entire thrift fund account was employee funded, that fund would not qualify under K.S.A. 1999 Supp. 44-501(h) as a retirement plan for which a deduction can be taken.

The significant dispute in this matter involves the profit sharing plan, which totaled \$116,516.68. Respondent argued, and the Administrative Law Judge found, that this fund constituted a retirement benefit which exceeded the maximum amount of claimant's award. The Administrative Law Judge, therefore, offset all disability benefits awarded to claimant in excess of claimant's functional impairment.

Claimant argues that the profit sharing account constitutes "additional compensation" as defined by K.S.A. 44-511(a)(2)(E) (Furse 1993). Therefore, it cannot be construed as a retirement benefit and is not subject to an offset under K.S.A. 1999 Supp. 44-501(h). Claimant contends that the profit sharing money is either additional compensation under K.S.A. 44-511 (Furse 1993) or a retirement benefit under K.S.A. 1999 Supp. 44-501(h), but cannot be both.

The Board notes that, under K.S.A. 44-511(a)(2) (Furse 1993), the term "additional compensation" also includes employer contributions to pension plans. A pension plan would also qualify as a retirement benefit, as it is based on age and/or years of service. The Board finds claimant's first argument lacks merit.

The Board, however, finds the creation of a profit sharing plan can be different from the creation of a retirement plan. As determined by the Kansas Court of Appeals in *Green*,¹ in quoting with approval from the Board's decision, the court states: "The Board construes 'retirement benefit' as a benefit paid by reason of age and/or years of service."

In *Green*, the court was asked to differentiate between retirement benefits based upon age and/or years of service and disability benefits based upon injury. The court found the two terms differed. The court, in *Green*, found disability benefits do not qualify under K.S.A. 1999 Supp. 44-501(h) for purposes of the offset.

Likewise, here, the terms "retirement benefits" and "profit sharing" are not synonymous. Retirement benefits, as noted above, are based upon age and/or years of service. Profit sharing contributions, on the other hand, are determined by a company's profits. The Board acknowledges the profit sharing plan is fully funded by the employer. However, profit sharing contributions are made only when a company earns a profit. There is no guarantee of payment into the plan.

Accordingly, the Board finds that the employer's profit sharing plan does not meet the definition of retirement benefits for the purposes of the statutory offset provisions of K.S.A. 1999 Supp. 44-501(h).

Pursuant to the stipulation of the parties, this matter will be remanded to the Administrative Law Judge for the determination of the remaining issues, including claimant's entitlement to a work disability pursuant to K.S.A. 1999 Supp. 44-510e.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Brad E. Avery dated July 24, 2002, should be, and is hereby, affirmed with regard to the cash balance retirement fund, but reversed with regard to the applicability of K.S.A. 1999 Supp. 44-501(h) to the respondent's profit sharing plan. The matter is remanded to the Administrative Law Judge for a determination of the remaining issues consistent with the above findings and conclusions.

¹ *Green v. City of Wichita*, 26 Kan. App.2d 53, 977 P.2d 283, rev. denied 267 Kan. 888 (1999).

IT IS SO ORDERED.

Dated this ____ day of March 2003.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Roy T. Artman, Attorney for Claimant
Gregory D. Worth, Attorney for Respondent
Brad E. Avery, Administrative Law Judge
Director, Division of Workers Compensation